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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

REPUBLIC WASTE INDUSTRIES, INC.,

Petitioner,

vs.

G.I. INDUSTRIES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED

1. Must a plaintiff in a breach of contract action (here an aborted merger agreement between two corporations) prove a causal nexus between a breach by the defendant and damages to the nonbreaching party, where the district court found as a matter of fact that the plaintiff could not and would not have performed prior to the time the defendant could have walked away from the merger with no penalty?

2. May the Ninth Circuit unilaterally fashion a rule of law effectively eliminating the historical requirement of proximate causation in contract cases, when such decision is in direct conflict with prevailing decisions of this Court, California state courts and statutes, and all federal circuit courts considering the question?

3. Did the Ninth Circuit's holding reversing the District Court's judgment in favor of petitioner herein amount to a denial of due process, where the effect of the panel's decision is to eliminate the universal requirement that plaintiffs in breach of contract cases prove proximate causation, thereby paving the way for recovery of damages in excess of what the plaintiff could have obtained through full performance of the contract?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were petitioner Republic Waste Industries, Inc. and respondent G.I. Industries.

Petitioner Republic Waste Industries, Inc. has no parent companies and no subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED . . . 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

The Failed Merger 4

The Trial Court Proceedings 4

The Factual Findings On The "Timing Issue" 5

The Court of Appeals' Decision 9

REASONS FOR GRANTING THE WRIT 10

The Ninth Circuit's Decision Rejects The "Ready, Willing And Able" Test Of Proximate Causation And Eviscerates The Universal Requirement That Plaintiffs Prove A Causal Nexus Between The Damages Sought And The Offending Conduct. 10

Page

The Ninth Circuit's Decision Deprives Petitioner Of Due Process By Eliminating The Universal Requirement That Plaintiffs In Breach Of Contract Cases Prove Proximate Causation Because The Ninth Circuit Has Paved The Way For An Arbitrary And Capricious Damage Award Against Petitioner.. 17

The Question Presented Is Important 19

CONCLUSION. 20

APPENDIX A

Memorandum, Ninth Circuit Court of Appeals, Filed March 23, 1995 . . . . . A1

Order Denying Rehearing, Ninth Circuit Court of Appeals, Filed May 12, 1995. . . . A9

APPENDIX B

Findings of Fact and Conclusions of Law, United States District Court Central District of California, Filed August 12, 1993 . . B1

APPENDIX C

Judgment, United States District Court Central District of California, Filed August 12, 1993. . . . . C1

TABLE OF AUTHORITIES

Page

Cases

Alabama Football, Inc. v. Greenwood,
452 F.Supp. 1191 (W.D. Penn. 1978) 14

Applied Equipment Corp. v. Litton Saudi Arabia,
7 Cal.4th 503, 28 Cal.Rptr. 475 (1994). 11

Bausch & Lomb Inc. v. Bressler,
977 F.2d 720 (2d Cir. 1992) 11

Electric M&R, Inc. v. Banco Popular
de Puerto Rico,
863 F.2d 1055 (1st Cir. 1988) 10, 11

Ersa Grae Corp. v. Fluor Corp.,
1 Cal.App.4th 613,
2 Cal.Rptr.2d 288 (1991). 8, 13

FDIC v. Everett A. Holseth & Co.,
36 F.3d 1004 (10th Cir. 1994) 12

Friend & Terry Lumber Co. v. Miller,
67 Cal. 464, 8 P. 40 (1885) 10

Gary v. Smith,
83 F. 824 (9th Cir. 1897). 15

Gibbs, Nathaniel (Canada) Ltd. v.
International Multifoods Corp.,
804 F.2d 450 (8th Cir. 1986). 14

Honda Motor Co. v. Oberg,
___ U.S. ___, 114 S.Ct. 2331,
129 L.Ed.2d 336 (1994) 17, 18

Page

Hospital Products, Inc. v. Sterile Design, Inc.,
734 F.Supp. 896 (E.D. Mo. 1990), *aff'd*,
923 F.2d 859 (8th Cir. 1990) 12

Kock Industries, Inc. v. Sun Co.,
918 F.2d 1203 (5th Cir. 1990) 15

Missouri Pacific Railway Co. v. Tucker,
230 U.S. 340, 33 S.Ct. 961 (1913) 17

Nat Harrison Associates, Inc. v. Gulf
States Utilities Co.,
491 F.2d 578 (5th Cir.), *reh'g den.*,
493 F.2d 1405 (1974) 11

Penthouse International, Ltd. v. Dominion
Federal Sav. & Loan,
855 F.2d 963 (2d Cir. 1988), *cert. denied*,
490 U.S. 1005 (1989) 14

Petroleum Energy v. Mid-America Petroleum,
775 F.Supp. 1420 (D. Kan. 1991) 11, 18

Record Club of America, Inc. v. United
Artists Records, Inc.,
890 F.2d 1264 (2d Cir. 1989) 15

Scholle v. Cuban-Venezuelan Oil Voting Trust,
285 F.2d 318 (2d Cir. 1960) 15

Shendur v. U.S.,
874 F.Supp. 85 (S.D.N.Y. 1995) 18

Stephens v. City of Vista,
994 F.2d 650 (9th Cir. 1993) 12

Page

Western Grocer Co. v. New York Oversea Co.,
28 F.2d 518 (D. Cal. 1928). 15

Wisconsin Knife Works v. National
Metal Crafters,
781 F.2d 1280 (7th Cir. 1986) 10, 12

Federal Statutes

28 U.S.C. Section 1254(1) 2

State Statutes

California Civil Code
Section 3300. . . . . 2, 10, 18
Section 3358. . . . . .2, 11-13, 18

Publications

17A Am.Jur.2d Contracts § 614 (1991) 14

Calamari & Perillo, *The Law of Contracts*,
12-3 (3d ed. 1987). 14

4 A. Corbin, *Corbin on Contracts* §978 (1951) 13

Farnsworth, *Contracts*, § 8.22 (2d ed. 1990) 14

5 Williston, *A Treatise on the Law of Contracts*
§ 699, § 882 (3d ed. 1961) 14

Constitution

United States Constitution
Fifth Amendment 2, 17, 19

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

REPUBLIC WASTE INDUSTRIES, INC.,
Petitioner,
vs.
G.I. INDUSTRIES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Republic Waste Industries, Inc. ("petitioner") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on March 23, 1995.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Ninth Circuit is reprinted in Appendix A ("App. A") hereto, pp. A-1 to A-8. The memorandum opinion and judgment of the United States District Court for the Central District of California (Wilson, D.J.) have not been reported. They are printed in Appendix B ("App. B") hereto, pp. B-1 to B-16, and Appendix C ("App. C") hereto, pp. C-1 to C-2, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 23, 1995. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on May 12, 1995. (App. A, p. 9.)

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATUTES INVOLVED

California Civil Code Section 3300 provides, in part:

> "For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the aggrieved party for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

California Civil Code Section 3358 provides, in part:

> "[N]o person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."

STATEMENT OF THE CASE

Petitioner is a solid waste corporation publicly traded on the NASDAG andToronto Stock Exchanges. The underlying lawsuit arose out of an attempted merger between petitioner and an entity known as G.I. Industries, Inc. ("G.I."). G.I. is curre..tly in a Chapter 11 bankruptcy proceeding in the Central District of California, operating under the control of a court-ordered trustee, following a request by one of its creditors.

This petition arises out of the Ninth Circuit's reversal of the District Court's holding, in a court trial, that G.I. is not entitled to damages for petitioner's repudiation of the Merger Agreement between the parties. The District Court so held based on its factual finding that G.I. would not and could not have performed its obligations under the Merger Agreement prior to the date petitioner could have and would have walked away from the Merger Agreement with no penalty pursuant to a contractual walkaway date. Because G.I. was not ready, willing and able to perform under the Merger Agreement prior to the date petitioner could have lawfully walked away from the deal, the district court concluded that petitioner's repudiation did not proximately cause damage to G.I.

The Ninth Circuit reversed, holding that whether G.I. could have performed by the contractual walkaway date is "irrelevant" to the question of G.I.'s entitlement to compensatory damages. In so doing, the Ninth Circuit eviscerated the concept of proximate causation in contract cases, eliminating the universal requirement that plaintiffs prove a causal nexus between the damages sought and the offending conduct.

The Failed Merger

On September 20, 1990, petitioner and G.I. entered into an agreement whereby petitioner would have acquired G.I. in a stock-for-stock swap. The Merger Agreement contained a walkaway provision allowing either party not in material breach of the Agreement to voluntarily terminate the agreement with no penalty on January 31, 1991. (App. B, p. 1.)

The price of the "stock-for-stock swap" was to be determined in a secondary public offering of petitioner's stock, which took place on December 7, 1990. Due to a market downturn of waste stocks in the fall of 1990, the public offering was unexpectedly low and made the merger economically unfeasible from the point of view of petitioner.

On December 19, 1990, petitioner advised G.I. that it was not willing to go forward with the merger under the existing economic conditions, and attempted to renegotiate the terms of the Merger. When G.I. refused, petitioner terminated the Agreement, and this lawsuit followed.[1]

The Trial Court Proceedings

The parties waived trial by jury, and the matter was tried to the Honorable Stephen V. Wilson. Prior to trial, Judge Wilson bifurcated the liability and damages phases of the trial.

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[1] Petitioner filed a complaint seeking, among other things, a declaration that it had lawfully terminated the Merger Agreement pursuant to its terms. G.I. then filed a counterclaim against petitioner alleging that petitioner breached the Merger Agreement by, among other things, repudiating it and refusing to go forward with its obligations thereunder.

In an August 17, 1992 Memorandum of Decision on the liability phase of trial, Judge Wilson found that petitioner had anticipatorily repudiated the Merger Agreement. (App. B, p. 2.) Judge Wilson ruled that a further trial would be conducted as to certain unresolved issues, including damages. By order filed January 13, 1993, the trial court specified the remaining issues to be tried, including whether, had petitioner not repudiated the Merger Agreement, G.I. would have had the ability to comply with certain obligations imposed on it in the Merger Agreement.

After deciding several of the unresolved issues through summary judgment motions and evidentiary hearings, Judge Wilson was left with the following "timing issue": could G.I. have obtained shareholder approval of the Merger Agreement by January 31, 1991, the date petitioner could have walked away from the Merger Agreement with no penalty.

The Factual Findings On The "Timing Issue"

In determining whether the merger could have been consummated by January 31, 1991, the central issue became whether, between December 19, 1990, the date of repudiation, and January 31, 1991, the parties acting in good faith could have completed all tasks which needed to be completed to close the merger. (App. B, p. 2.) Judge Wilson found that the following tasks would have had to be completed between December 19 and January 31:

1. The Agreement required G.I. to divest itself of an unprofitable subsidiary, G.I. Equipment Leasing ("GIEL"). This had not been done as of December 19, 1990. (App. B, pp. 4, 10.)

2. The GIEL divestiture, when completed, had to be documented. (App. B, pp. 10-11.)

3. The terms of the GIEL divestiture had to be included in the Form S-4 Registration Statement ("S-4") required by law to be submitted to the Securities Exchange Commission ("SEC"). (App. B, p. 11.)

4. A "scope limitation" imposed by its independent auditors contained in the G.I. financials had to be resolved with the SEC. (App. B, p. 15.)

5. The SEC had to conduct its initial review of the S-4 and issue its comments. (App. B, pp. 12-13.)

6. The S-4 had to be revised in response to the SEC's comments and resubmitted to the SEC. (App. B, p. 13.)

7. The SEC had to approve the revisions and declare the S-4 effective. (App. B, pp. 13-14.)

8. The effective S-4 had to be submitted to the G.I. shareholders no later than *January 11, 1991*, in order to give the G.I. shareholders their statutorily required twenty-days' notice of a shareholder vote, meaning that tasks 1-7 above all had to be completed between December 19 and January 11 — a period of only *twelve business days* which includes the holiday season. (App. B, p. 7.)

After hearing exhaustive testimony on this "timing issue," including testimony from five experts, Judge Wilson concluded that the parties could not have even theoretically secured SEC and shareholder approval of the Agreement by January 31. (App. B, p. 15.) Judge Wilson ruled that a *smooth and efficient* S-4 filing takes *thirty-nine days* to be declared effective: thirty days for the initial comment letter, seven days for response to the comment letter and further SEC review, two days for expedited treatment, and overnight mailing. (App. B, p. 14.) This thirty-nine-day timetable is for a *smooth* filing, *not* an average filing, and certainly not the

complex filing at issue in this case. Judge Wilson specifically found that "[t]his amount of time for SEC review isn't an average time; it is a time period that a securities lawyer would view as being very efficient with a smooth filing." (App. B, p. 14.)

Even with a smooth filing, shareholder approval of the merger could not have been obtained prior to the walkaway date, and petitioner could and would have walked away from the merger on January 31 in the same manner it did on December 19.

Judge Wilson went on to hold as a matter of fact that the Republic-G.I. S-4 was *not* a smooth filing. (App. B, pp. 14-15.) Several aspects of the merger would have generated increased SEC scrutiny. First, an affiliated transaction, such as selling GIEL to its principals as proposed, would have increased such scrutiny. (App. B, p. 14.)

Second, aside from the GIEL divestiture, the Agreement gave multiple benefits to the G.I. principals and other insiders including assumption of indebtedness, elimination of guarantees and employment contracts. Such benefits to insiders necessarily trigger increased SEC investigation because the SEC's strict rules regarding related-party transactions require full disclosure of the insiders' interest in the transaction. (App. B, pp. 14-15.)

Third, as of December 19, G.I.'s auditors still refused to certify G.I.'s financials because of a qualification in the financials relating to certain missing records. Yet G.I. was required to deliver to petitioner certified financial statements for the three years prior to the merger for inclusion in the S-4. (App. B, p. 8.)

The three factors noted above would have substantially delayed effectiveness of the S-4, well beyond the January 31, 1991 walkaway date. (App. B, p. 15.) Indeed, there was at least a possibility that the S-4 might never be declared effective. (App. B, pp. 8, 15.)

In summary, the trial court found that the SEC could not under any theoretical scenario have declared the S-4 effective by January 11, 1991. Therefore, G.I. could not have sent out the Notice and obtained shareholder approval by the January 31, 1991 walkaway date. Because petitioner could have and would have walked away from the merger on January 31, 1991 without penalty, and because G.I. could not prove that it was ready, willing and *able* to consummate the merger by January 31, 1991, judgment was awarded to petitioner. (App. B, p. 15.)

In his August 11, 1993 Findings of Fact and Conclusions of Law, Judge Wilson made the following critical findings of fact:

1. If petitioner had not repudiated the Merger Agreement on December 19, 1990, petitioner would have walked away from the merger with no penalty on January 31, 1991 (App. B, p. 2); and
2. On December 19, 1990, the date of the repudiation, there was no way the merger could have been completed by the January 31, 1991 walkaway date. (App. B, p. 15.)

Relying on these factual findings and the California Court of Appeal's decision in *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal.App.4th 613, 2 Cal.Rptr.2d 288 (1991), the trial court held that G.I. could not recover damages for petitioner's repudiation because petitioner's repudiation did not proximately cause damage to G.I. Stated another way, G.I. failed to sustain its burden of proving that it was ready, willing and able to perform under the Merger Agreement. (App. B, p. 15.) Accordingly, the trial court entered judgment on behalf of petitioner. (App. C, pp. 1-2.)

The Court of Appeals' Decision

G.I. appealed the trial court judgment to the United States Court of Appeals for the Ninth Circuit. In rendering its decision, the Ninth Circuit did not disturb the trial court's findings of fact. (App. A, p. 4.) Thus, the Ninth Circuit accepted as true that (1) on December 19, 1990, the date of the repudiation, there was no way the merger could have been completed by the January 31, 1991 walkaway date, and (2) if petitioner had not repudiated the Merger Agreement on December 19, 1990, petitioner would have walked away from the merger with no penalty on January 31, 1991.

The Ninth Circuit nevertheless reversed the trial court's judgment, holding that whether petitioner could have and would have walked away from the merger on the January 31, 1991 walkaway date is "irrelevant" to the question of whether G.I. is entitled to compensatory damages. (App. A, p. 7.) In so doing, the Ninth Circuit expressly rejected the "ready, willing and able" test of proximate causation as a limitation on a plaintiff's ability to recover damages for an anticipatory repudiation of a merger agreement. (App. A, pp. 7-8.)

Petitioner timely petitioned the Ninth Circuit for rehearing and/or rehearing *en banc*. By order dated May 12, 1995, the petition for rehearing and suggestion for rehearing *en banc* was denied. Although one Panel Judge recommended a hearing *en banc*, no judge requested a vote to rehear the matter *en banc*. (App. A, p. 9.)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Decision Rejects The "Ready, Willing And Able" Test Of Proximate Causation And Eviscerates The Universal Requirement That Plaintiffs Prove A Causal Nexus Between The Damages Sought And The Offending Conduct.

Prior to the Ninth Circuit decision at issue here, it was a universally recognized principle of contract law that in a breach of contract action, a plaintiff could only recover those damages which were proximately caused by the breach. *See, e.g., Electric M&R, Inc. v. Banco Popular de Puerto Rico*, 863 F.2d 1055, 1059 (1st Cir. 1988) ("[i]t is a basic principle of contract law that damages cannot be recovered unless they were in fact caused by defendant's breach"); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1289 (7th Cir. 1986) ("[a]s in tort law, so in contract law, causation is an essential element of liability"). *See also*, California Civil Code Section 3300 (plaintiff is only entitled to recover damages "proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result therefrom").

For centuries, courts have recognized that in breach of contract actions plaintiffs must establish a causal connection between the breach and the damages sought. As far back as 1885, the California Supreme Court held that in order to recover damages for breach of contract, "[t]he damages must be proximately caused thereby — that is, such as next immediately follow and are produced by the act complained of." *Friend & Terry Lumber Co. v. Miller*, 67 Cal. 464, 467, 8 P. 40 (1885).

Prior to the Ninth Circuit's decision at issue here, it was an equally well-entrenched principle of contract law

that its remedies are designed to place the aggrieved party in the same position he or she would have been in *but for* the breach and, consequently, a plaintiff cannot recover more in a lawsuit for breach of contract than he or she could have obtained through contract performance:

> [A] fundamental principle of damages for breach of contract is that the injured party should be placed in the same position that he would have occupied if the contract had been performed. A party is not entitled to be placed in a better position than full performance by the other party would have placed him. *In other words, the party should not be placed in a better position than he would have been in if the breach had not occurred.*

Petroleum Energy v. Mid-America Petroleum, 775 F.Supp. 1420, 1427 (D. Kan. 1991) (citations omitted) (emphasis added).

This principle of law is codified in the California Civil Code: "no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides." California Civil Code Section 3358. This principle is also recognized by the California Supreme Court. *See Applied Equipment Corp. v. Litton Saudi Arabia*, 7 Cal.4th 503, 515, 28 Cal.Rptr. 475 (1994). Until the Ninth Circuit's decision here, this principle of law was equally recognized by virtually every circuit court which has addressed the issue. *See Electric M&R v. Banco Popular de Puerto Rico*, 863 F.2d 1055, 1059 (1st Cir. 1988); *Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 729 (2d Cir. 1992); *Nat Harrison Associates, Inc. v. Gulf States Utilities Co.*, 491 F.2d 578, 587 (5th Cir.), *reh'g*

den., 493 F.2d 1405 (1974); ***Wisconsin Knife Works v. National Metal Crafters***, 781 F.2d 1280, 1289 (7th Cir. 1986); ***Hospital Products, Inc. v. Sterile Design, Inc.***, 734 F.Supp. 896, 907 (E.D. Mo. 1990), ***aff'd***, 923 F.2d 859 (8th Cir. 1990); ***Stephens v. City of Vista***, 994 F.2d 650, 657 (9th Cir. 1993); ***FDIC v. Everett A. Holseth & Co.***, 36 F.3d 1004, 1008 (10th Cir. 1994).

Here, the Ninth Circuit has obliterated the proximate causation requirement and has paved the way for G.I. to recover more in damages for breach than it could have recovered from performance of the Merger Agreement. The trial court expressly found that the Republic/G.I. merger *would not* and *could not* have been consummated by January 31, 1991, and that, if petitioner had not repudiated the Agreement on December 19, 1990, it would have exercised its right to walk away from the merger with *no penalty* on January 31, 1991. (App. B, pp. 2, 15.) Because the trial court found that the merger would have died of natural causes when the walkaway date arrived, G.I. would not have reaped any financial benefit from the Merger Agreement if petitioner had not repudiated on December 19, 1990.

Nonetheless, the Ninth Circuit's ruling places G.I. in a position to recover as "compensatory damages" sums it could not and would not have gained but for the repudiation. Accordingly, the Ninth Circuit's decision is in direct conflict with California Civil Code Section 3358, the decisions of the California Supreme Court, and the decisions of all the federal circuit courts which have addressed the issue.

The fallacy in the Ninth Circuit's decision is rooted in its rejection of the "ready, willing and able" test of proximate causation as a limitation on a plaintiff's ability to recover damages for a breach of contract. It is well-settled in California, as well as the circuit courts, that in order to recover damages for an anticipatory

repudiation of a contract, the plaintiff must present evidence to satisfy a jury that *but for the breach*, the plaintiff was ready, willing and able to perform its obligations under the contract.

In *Ersa Grae v. Fluor*, 1 Cal.App.4th 613, 2 Cal.Rptr. 288 (1991), the case which the District Court relied on in entering judgment in favor of petitioner, the court held that a plaintiff suing for anticipatory repudiation of a contract must prove that it was "ready, willing and able to perform the contract and failed to do so only because [the defendant] repudiated the contract." *Id.* at 624. The *Ersa Grae* rule is a test for proximate causation. *Id.* at 626. If the evidence establishes that plaintiff could not have performed but for the repudiation, then the repudiation "did not cause damage to [the plaintiff]." *Id.* The *Ersa Grae* rule, like California Civil Code Section 3358, is designed to ensure that no party can recover more for a breach of contract than it could have recovered if the contract had not been breached. *Id.* at 624-25.

The *Ersa Grae* rule is an outgrowth of well-established contract law proximate causation principles. As Corbin observed in his oft-cited treatise on contracts:

> In an action for breach by an unconditional repudiation it is still a condition precedent to the plaintiff's right to a judgment for damages that he should have the ability to perform all such conditions. . . . Of course, the willingness and ability that remains a condition precedent in spite of defendant's repudiation, is willingness and ability to perform *if there had been no repudiation.*

4 A. Corbin, *Corbin on Contracts* §978, pp. 924-25 (1951) (emphasis added). Professor Williston states the

"ready, willing and able" doctrine as follows: "the manifestation of unwillingness or inability of the promisor to perform will not give rise to a cause of action because the promisee cannot allege and prove that he would have become entitled to receive performance by complying with the condition, had it not been for the promisor's misconduct." 5 Williston, *A Treatise on the Law of Contracts* § 699 at 352-353 (3d ed. 1961) (also § 882 at 389-392). *See also* Farnsworth, *Contracts*, § 8.22 at 666-667 (2d ed. 1990); Calamari & Perillo, *The Law of Contracts*, 12-3 at 522 (3d ed. 1987); *17A Am.Jur.2d* Contracts § 614 at 622 (1991).

Courts throughout this country uniformly apply the ready, willing and able doctrine. *See, e.g., Penthouse International, Ltd. v. Dominion Federal Sav. & Loan*, 855 F.2d 963, 979 (2d Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (quoting Corbin and holding that plaintiff must demonstrate that it had a willingness and ability to perform *before* the repudiation, and that it would have performed *but for* the repudiation); *Gibbs, Nathaniel (Canada) Ltd. v. International Multifoods Corp.*, 804 F.2d 450, 452 (8th Cir. 1986) ("[t]o collect damages for an anticipatory breach, a party must show that it was capable of performance notwithstanding the anticipatory breach"); *Alabama Football, Inc. v. Greenwood*, 452 F.Supp. 1191, 1196 (W.D. Penn. 1978) ("in light of [plaintiff's] failure to prove its ability to perform at the time of repudiation, [plaintiff] is precluded from any recovery of damages").

The Second Circuit has stated the rule as follows:

> [T]hough a party need not continue to perform the contract after the other party has anticipatorily repudiated it, he must nonetheless demonstrate that he had the willingness and ability to perform *before the repudiation* and

> that the plaintiff would have rendered the agreed performance if the defendant had not repudiated. This principle is merely an application of the general rule that the complaining party must demonstrate that the breach caused him injury; '[t]o do this he must prove that he intended to and was able to perform when his performance was due.'

Record Club of America, Inc. v. United Artists Records, Inc., 890 F.2d 1264, 1275 (2d Cir. 1989) (emphasis added) (citations omitted) (quoting *Scholle v. Cuban-Venezuelan Oil Voting Trust*, 285 F.2d 318, 320 (2d Cir. 1960)). *See also, Kock Industries, Inc. v. Sun Co.*, 918 F.2d 1203, 1214 (5th Cir. 1990) (plaintiff who is not ready, willing and able to perform the contract "suffers no legal damage from breach").

Prior to the Ninth Circuit's decision here, it had recognized the ready, willing and able doctrine for almost 100 years. *See Gary v. Smith*, 83 F. 824, 829 (9th Cir. 1897); *Western Grocer Co. v. New York Oversea Co.*, 28 F.2d 518 (D. Cal. 1928).

Here, the trial court found as a matter of fact that if petitioner had not repudiated the Merger Agreement on December 19, 1990, petitioner would have walked away from the merger with no penalty on January 31, 1991. (App. B, p. 2.) The trial court also found as a matter of fact that at the time petitioner anticipatorially repudiated the Merger Agreement, G.I. could not have done all it needed to do by January 31, the date petitioner would have walked away from the merger with no penalty. (App. B, p. 15.) Accordingly, the trial court ruled that G.I. was not ready, willing and able to perform all of its obligations under the Merger Agreement prior to January 31, 1991, the date petitioner would have

rightfully terminated the merger. (App. B, p. 16.) Stated differently, *but for* petitioner's repudiation, the merger would nonetheless have failed. As a consequence, any damages sustained by G.I. were not proximately caused by petitioner's breach.

In reversing the trial court's judgment, the Ninth Circuit held that whether the merger would have been consummated but for petitioner's repudiation is "irrelevant" to the issue of G.I.'s entitlement to damages for the breach of the Merger Agreement. (App. A, p. 7.) This clear and unequivocal rejection of the ready, willing and able doctrine is contrary to California law; it is contrary to the decisions of the California Supreme Court; it is contrary to the prior decisions of the Ninth Circuit; it is contrary to the decisions of all other federal circuit courts which have considered this issue; it is contrary to universally recognized contractual principles; and it paves the way for G.I., and all other parties to contractual disputes of every kind, to obtain far more through litigation than they would have been able to obtain through the marketplace. Such a disturbing precedent should not be allowed to stand. Accordingly, this Court should grant this petition and correct the clear error of the Ninth Circuit and restore uniformity in the standards for assessing the right to recover damages in breach of contract cases.

The Ninth Circuit's Decision Deprives Petitioner Of Due Process By Eliminating The Universal Requirement That Plaintiffs In Breach Of Contract Cases Prove Proximate Causation Because The Ninth Circuit Has Paved The Way For An Arbitrary And Capricious Damage Award Against Petitioner.

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law. Petitioner's right to due process insures, among other things, that petitioner's property will not be taken in an arbitrary or capricious manner. Indeed, this Court recently stated that "the whole purpose" of the Due Process Clause is to prevent "arbitrary deprivations of liberty or property." *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 2342, 129 L.Ed.2d 336 (1994).

In the context of damages, this Court has held on several occasions that an arbitrary or excessive damage award constitutes a deprivation of property without due process, and is a violation of the Unites States Constitution. In *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340, 33 S.Ct. 961 (1913), this Court reversed a $500 liquidated damages award in favor of plaintiff because:

> [T]he imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but it is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment.

Id. at 964. *See also, Shendur v. U.S.*, 874 F.Supp. 85, 87 (S.D.N.Y. 1995) ("[p]enalties not related to their factual underpinning are contrary to due process").

The issue of arbitrary and excessive damage awards has also been addressed by this Court in the context of punitive damage awards. In *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 2342, 129 L.Ed.2d 336 (1994), this Court ruled that punitive damage awards which are not subject to judicial review as to reasonableness violate the Due Process Clause. In so ruling, this Court noted that "abrogation of a well-established common law protection against arbitrary deprivations of property raises a *presumption* that [the] procedures violate the Due Process Clause." *Id.* at 2339 (emphasis added).

Here, not only has the Ninth Circuit abrogated common law protections against arbitrary damage awards for breach of contract, it has abrogated *statutory* protections against arbitrary damage awards for breach of contract. Thus, the Ninth Circuit's decision presumptively violates the Due Process Clause.

California Civil Code Section 3300 provides that a plaintiff is entitled to recover only those damages "proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result therefrom." The proximate causation requirement has been universally recognized by state and federal courts since the nation's founding. The purpose of the proximate causation requirement is to ensure that damages for breach of contract place the "injured party" in the same position as if the contract had been performed and do not grant the plaintiff a windfall. *See, e.g., Petroleum Energy v. Mid-America Petroleum*, 775 F.Supp. 1420, 1427 (D. Kan. 1991); Cal. Civ. Code Section 3358 ("no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by

the full performance thereof on both sides"). Thus, the proximate causation requirement is not a dry formality, but a fundamental element which insures that damage awards are not arbitrary or capricious.

Here, in a court trial, the District Court found that there was no proximate causation between the alleged breach and the alleged damages. (App. B, p. 15.) The trial court reached a factual conclusion, undisturbed by the Ninth Circuit, that if petitioner had not repudiated the Merger Agreement, G.I. would have gained *nothing* through performance of the contract. Accordingly, every penny that G.I. is able to recover as damages for breach of the Merger Agreement will *necessarily* put G.I. in a better position than had petitioner performed under the contract, in violation of the California statutes and the universally recognized common law.

By holding the question of G.I.'s ability to perform to be "irrelevant" to the issue of G.I.'s entitlement to damages, the Ninth Circuit unequivocally abrogated the doctrine of proximate causation. In so doing, the Ninth Circuit has endorsed and authorized the awarding of arbitrary and capricious damages, in violation of the Due Process Clause. Accordingly, this Court should grant this petition and restore petitioner's Fifth Amendment due process rights.

The Question Presented Is Important

Mergers and acquisitions have become an increasingly important element of corporate growth as the global economy has expanded. The Ninth Circuit's decision creates a new threat for any company which engages in merger discussions: if the discussions fail, a potential suitor without any realistic ability to consummate the merger can nevertheless seek to obtain in the

courtroom what it was unable to achieve in the marketplace.

This country's courts are already overburdened with cases brought by parties seeking to use the litigation process to garner unfair profits. The judicial system is designed to compensate plaintiffs for the injuries actually suffered, not to create new opportunities for windfalls. The abandonment of the *but for* causation rule in contract cases is a radical departure from the principles which underlie our justice system. This court should intervene and vacate the decision below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: August 8, 1995.

Respectfully submitted,

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Counsel of Record

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A Partnership Including
Professional Corporations

Counsel for Petitioner
Republic Waste Industries, Inc.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 23 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

REPUBLIC WASTE INDUSTRIES, INC.,
Plaintiff-Counter-defendant-
Appellee,

v.

G.I. INDUSTRIES,
Defendant-Counter-claimant-
Appellant.

Nos. 93-56390, 94-55084
D.C. No. CV-91-2422-SVW

MEMORANDUM*

Appeals from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted, March 8, 1995
Pasadena, California

Before: BROWNING, BOOCHEVER and BEEZER,
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

G.I. Industries ("GI") appeals the district court's judgment, entered after a bench trial, in favor of Republic Waste Industries, Inc. ("Republic") on GI's counterclaim for breach of contract. The district court determined that Republic had anticipatorily repudiated the merger agreement between it and GI, but that GI was not entitled to damages because GI would have been unable to perform its duties under the agreement by the time that Republic would have been contractually entitled to terminate the merger. GI also appeals the district court's refusal to award it nominal damages and attorney fees. We have jurisdiction, 28 U.S.C. § 1291, and we reverse and remand.

I

In September of 1990, Republic and GI entered into a merger agreement ("agreement") under which Republic was to purchase GI in a stock-for-stock swap. Both Republic and GI had a number of duties under the agreement that they were required to perform in order to consummate the merger. Paragraph 12.2 of the agreement provided that the agreement could be terminated by either party "if the merger is not consummated by January 31, 1991, so long as the terminating party is not in material breach of the representations, warranties and covenants contained in this Agreement."

On December 19, 1990, after Republic had obtained disappointing results in a public stock offering, representatives of Republic met with representatives of GI and stated that Republic would not go forward with the merger. GI thereafter unsuccessfully attempted to negotiate a merger with a different company. Republic subsequently filed the present action for fraud and declaratory and injunctive relief. GI counterclaimed for breach of the agreement.

After a bench trial, the district court determined that Republic was not entitled to relief on any of its claims (Republic has not appealed). As to GI's counterclaim, the district court found (1) that Republic had anticipatorily repudiated the agreement on December 19, 1990, (2) that GI would have been unable to complete all of its duties necessary to consummate the merger before January 31, 1991, and (3) that, had it not repudiated the agreement on December 19, Republic would have terminated on January 31. Based on these findings, the district court held that GI was not able to perform under the agreement, and therefore that Republic's breach caused GI no damage.

GI requested that it be awarded nominal damages and attorney fees under a provision of the agreement providing that attorney fees should be paid to the prevailing party. The district court denied nominal damages and GI's request for attorney fees. GI has timely appealed.

II

We review the district court's application of state law *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). The interpretation of a contract is also a matter of law which is reviewed *de novo*. *Aetna Casualty and Surety Co. v. Pintlar Corp.*, 948 F.2d 1507, 1511 (9th Cir. 1991). The district court's findings of fact after a bench trial are reviewed for clear error, giving due regard to the trial court's opportunity to judge the credibility of witnesses. Fed. R. Civ. P. 52(a); *Brooker v. Desert Hosp. Corp.*, 947 F.2d 412, 415 (9th Cir. 1991).

III

Accepting the district court's findings of fact as true, the court erred as a matter of law in holding that Republic's anticipatory repudiation did not proximately cause any damage to GI. Specifically, the district court erred in applying the rule stated by the California Court of Appeals in *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613 (1991).

A

In *Ersa Grae*, the court held that, as part of its case-in-chief, a plaintiff suing for anticipatory breach "must present evidence sufficient to satisfy a jury that, but for [the defendant's] breach, [the plaintiff] was ready, willing and able to perform as required by the contract." 1 Cal. App.4th at 626. If the plaintiff cannot carry this burden, the court reasoned, any damage it suffered was proximately caused by its own inability to perform rather than the defendant's breach. Under those circumstances, any recovery by the plaintiff would be a windfall.

Here, GI had certain obligations under the contract in order to complete the merger. Under ¶ 12.2 of the agreement, if the merger had not been completed by January 31, 1991, then either party had the contractual right to terminate the merger so long as the terminating party was not in material breach of the agreement. The district court correctly interpreted this provision to mean that "January 31, 1991 ... [was] not a mandatory closure date. Instead it [gave] either party the option to get out of the deal if it had not closed by that time, assuming no breach by the walking away party." The court nevertheless applied *Ersa Grae* as though the contract *required* GI to complete all of its duties by

January 31 at the latest. The district court erred in determining that *Ersa Grae* applied in this situation.

Contrary to Republic's arguments, the parties here did not contract for a merger "consummated by January 31, 1991." Rather, the closing date of the merger was unspecified. Paragraph 12.2 of the merger agreement does not create any duties on the part of GI, it merely creates a conditional right of termination in any nonbreaching party. Therefore, GI would not have been in breach of the agreement had it failed to perform its duties by January 31. In order to invoke the *Ersa Grae* rule and bar an otherwise valid cause of action, a party's "inability" to perform must be in breach of the contract.

This interpretation is mandated by the words of *Ersa Grae* itself, which bars recovery only if the plaintiff would have been unable "to perform *as required by the contract.*" 1 Cal. App. 4th at 626 (emphasis added). The rule stated by *Ersa Grae* is founded on basic contract principles: if the plaintiff inevitably would have materially breached the agreement, thus excusing the defendant's performance, the defendant should not be held liable. *Restatement (Second) of the Law of Contracts* § 244, cmt. a (explaining that the nonbreaching party's inability to perform excuses the repudiating party's duty to pay damages "if [the failure to perform] would have been sufficient to have discharged the remaining duties of the party in breach to render his performance"). Where there is no inevitable breach, this rule has no application.

Here, the district court found, and appellees argue, only that GI could not have performed its duties by January 31. *The contract did not require GI to perform its duties by that date*, and GI's failure to perform by that date would not have been a material breach. The *Ersa Grae* rule should never have been invoked.

B

Republic argues that an alternative formulation of the *Ersa Grae* rule supports its position. That formulation is: "plaintiff [must] prove it would have performed, 'but for' the repudiation." Republic relies on the "but for" language to argue that we must disregard the anticipatory repudiation in determining whether Republic would have exercised its right to terminate the agreement. This argument confuses the legal rule of proximate causation stated in *Ersa Grae* with the factual determination of whether all express conditions subsequent to the exercise of contractual right have been satisfied.

Ersa Grae states that, as a matter of law, a plaintiff who could not have performed its contractual duties is not entitled to damages based on the defendant's failure to perform. The "but for" formulation put forth by Republic is correct insofar as it means that, in determining whether the plaintiff could have performed its duties, those duties are not excused by the defendant's breach. It is incorrect, however, to infer that the defendant's repudiation must be ignored for all purposes. The determination of whether a condition subsequent to the exercise of right has been satisfied is factual. Here, the question is "was the party attempting to exercise the right to terminate not in material breach of the contract?" As a matter of fact, the answer is no. The condition subsequent was not satisfied, and Republic never had a right to terminate. The fact that Republic's breach must be ignored as a matter of law in determining whether GI could have performed its duties does not mean that it should be ignored in determining the facts of the case.

C

Finally, Republic argues that we should affirm the district court's determination that proximate causation was lacking on the alternative ground that *but for Republic's anticipatory repudiation*, it could have and would have exercised its conditional contractual right to terminate the agreement. Assuming this fact to be true, it is nevertheless irrelevant. By repudiating the agreement, Republic gave up any contractual right it might have had to terminate. *See Bertrero v. Superior Court*, 216 Cal. App. 2d 213, 218-19 (1963) (citing 6A Corbin on Contracts, pp. 434-35).

Even if Republic had not given up its contractual right to terminate, the express terms of ¶ 12.2 would have precluded it from terminating the agreement. Republic would only have had a right to terminate the agreement if two conditions were met: (1) the merger must have been incomplete on January 31, 1991, and (2) when Republic sought to exercise the right, it must not have been in material breach of its obligations under the agreement. The district court found that the first of these factual predicates inevitably would have been satisfied. The second, however, was not satisfied. Republic *was* in material breach of its obligations on January 31, 1991 by virtue of its anticipatory repudiation on December 19, 1990. After that repudiation, Republic never had, and never would have had, a contractual right to terminate the agreement.

Republic's anticipatory repudiation divested it of any right to terminate the agreement both by operation of law and by operation of the express terms of the agreement. Whether Republic would have exercised the hypothetical right is therefore not relevant to the issue of damages.

We hold that GI's inability to complete its duties by the January 31, 1991 "walkaway" date is not a legal bar

to GI's recovery of damages for Republic's repudiation of the merger agreement.

IV

The district court's judgment in favor of Republic on GI's counterclaim is REVERSED, the district court's order denying GI's request for nominal damages and attorney fees is VACATED, and the case is REMANDED for further proceedings consistent with this memorandum.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAY 12 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

REPUBLIC WASTE INDUSTRIES, INC.,
Plaintiff-Counter-defendant-
Appellee,

v.

G.I. INDUSTRIES,
Defendant-Counter-claimant-
Appellant.

Nos. 93-56390, 94-55084
D.C. No. CV-91-2422-SVW

ORDER

Before: BROWNING, BOOCHEVER and BEEZER,
Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Browning and Beezer vote to reject the suggestion for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 12 1993
Clerk, U.S.District Court
Central District of California
By /s/ _____ Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

REPUBLIC WASTE INDUSTRIES, INC.,
Plaintiff

v.

G.I. INDUSTRIES, MANUAL ASADURIAN, SR. and MIKE SMITH,
Defendants.

AND RELATED COUNTERCLAIM

CV-91 2422 SVW (Kx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I THE WALK-AWAY DATE

1. The Merger Agreement states that either party may walk away from the merger if it is not completed on January 31, 1991, as long as that party is not in breach of the Agreement. Ex. 26, Section 12.2.

2. The January 31, 1991 date is not a mandatory closure date. Instead, it gives either party the option to get out of the deal if it had not closed by that time, assuming no breach by the walking away party.

3. Republic Waste Industries, Inc. ("Republic") repudiated shortly after learning the results of the public offering in mid-December. *See* Court's Memorandum of Decision, filed August 17, 1992.

4. The Court finds that Republic's actual repudiation on December 19, 1990 supports a finding that had it not repudiated on that date, Republic would have walked away from the deal if it was not consummated by January 31, 1991.

5. Accordingly, the Court must determine whether G.I. Industries ("GI") could have performed its obligations in time to meet the January 31st walk-away date had Republic not repudiated and had the parties proceeded on the agreed upon time table for the SEC filings.

II. S-4 FILING DATE

A. The Court Does Not Accept GI's Argument that the S-4 Would Have Been Filed in Late November.

6. GI argued that Republic actually stopped working in late November/early December 1990 even though Republic did not actually repudiate until December 19, 1990.

7. GI claims that it should be excused from working on any of the tasks it was responsible for after the date Republic stopped working. Further, GI argues that because Republic stopped working in late November, the Court should assume that the S-4 was filed at that time.

8. The Court already found, however, that GI did not learn of Republic's decision to stop working until December 19, 1990.

9. GI did not present any evidence that it learned of Republic's decision earlier than December 19th.

10. Hence, the Court finds no reason to excuse GI prior to that date

B. The Court Does Not Accept GI's Argument That the S-4 Would Have Been Filed On the Date Specified in the Merger Agreement.

11. The original Merger Agreement stated that Republic would file the S-4 in October of 1990, shortly after filing the S-1. Ex. 26, Section 12.4.

12. Republic's counsel requested two extensions on the S-4 filing date stated in the Merger Agreement. Goon testimony.

13. Mr. Goon, GI's counsel executed an Amendment to the Merger Agreement extending the date from October 22, 1990 to November 2, 1990.

14. Mr. Goon never signed the second Amendment extending the date to November 28, 1990.

15. Mr. Good did write to GI in early November, stating that he was impressed with Republic's counsel's competence and diligence and that the target date for the S-4 was end of November. Ex. 262.

16. The Court finds that this letter evidences Mr. Goon's acceptance of Republic's strategy of waiting to file the S-4 until the S-1 became effective.

17. The S-1 became effective on December 7, 1990. Cohen Deposition Testimony at 34.

18. Based on GI's acquiescence in Republic's strategy, the Court finds no basis for any finding of breach by Republic of Merger Agreement Section 9.1.

19. The Court finds further that any such breach did not cause the late filing of the S-4 because the S-4 couldn't have been filed without the G.I. Equipment Leasing ("GIEL") divestiture terms, a matter for which GI was responsible and which was within GI's control. *See* Findings 20-34.

C. The S-4 Would Have Been Filed When the Final Piece of Required Information, The GIEL Divestiture Terms, Became Available.

20. Regardless of any assistance in selling GIEL which Republic provided, the Merger Agreement required GI to divest itself of GIEL.

21. Although Republic took the lead in obtaining offers for GI, GI was also free to consider and act on the offers of the Asadurians.

22. Unlike the agreed upon division of labor on the financial information required for the S-4, the Court finds no evidence that Republic ever agreed to take responsibility for the divestiture of GIEL. Instead, Republic was assisting in trying to find a buyer in an attempt to influence the terms of that sale.

23. The Court finds no evidence that Republic's conduct in soliciting offers for GIEL precluded GI from reaching an agreement in principle with the Asadurians. The Court finds no evidence that Republic told GI that it would find a buyer and that GI should refrain from attempting to do so.

24. THEREFORE, THE COURT FINDS THAT GI WAS RESPONSIBLE FOR DIVESTING GIEL.

25. GI's expert, Mr. Feis, suggests that Republic could have submitted the S-4 without the details of the GIEL divestiture.

26. Mr. Feis stated that if the divestiture had been to insiders such as the Asadurians, the S-4 would have had to have contained certain disclosures regarding the transaction, including the possibility that GIEL could become profitable.

27. The Court credits Mr. Mendelsohn's testimony that submitting the S-4 without information on an affiliated transaction could have caused problems with the SEC.

28. There is no evidence that the parties considered submitting the S-4 without the divestiture information. In fact, Mr. Good stated in a letter sent to GI on November 6, 1990 that "the arrangements for the divestiture should be pinned down before the S-4 is filed with the SEC. Again the target for filing the S-4 is near the end of November, 9 so it is very important that the leasing company divestiture deal be squared away by then." Ex. 262 at p. 3.

29. HENCE, THE COURT FINDS THAT REPUBLIC COULD NOT HAVE SUBMITTED THE S-4 UNTIL THE DIVESTITURE TERMS WERE DEFINED.

30. In an earlier Order, the Court found that the Asadurians would have bought GIEL as a last resort to save the merger.

31. The Asadurians had not agreed in principle to purchase GIEL as of December 19, 1990.

32. Mr. Goon states in his Declaration that he "could have documented and completed a sale [of GIEL to the Asadurians] within several days after an agreement in principle was reached by the parties."

33. Assuming an agreement in principle was reached on December 19, 1990, the GIEL divestiture terms

would not have been available until December 21, 1990 at the earliest.

34. THEREFORE, REPUBLIC COULD NOT FILE THE S-4 ANY EARLIER THAN DECEMBER 21, 1990 BECAUSE GI COULD NOT HAVE DELIVERED INFORMATION IT WAS RESPONSIBLE FOR PROVIDING UNTIL DECEMBER 21ST AT THE EARLIEST.

III. IN ORDER TO MEET THE JANUARY 31, 1991 WALK-AWAY DATE, THE SEC WOULD HAVE HAD TO HAVE DECLARED THE S-4 EFFECTIVE BY JANUARY 11, 1991.

35. State law requires a company to give its shareholders twenty day's notice of a shareholders' meeting.

36. In order to consummate the merger prior to the walk-away date, GI's shareholders had to approve the merger at a shareholders' meeting by January 31, 1991.

37. Therefore, GI would have had to have sent out the Notice by January 11, 1991 in order to meet the walk-away deadline.

38. GI argued that it would have sent out the Notice without including an effective S-4.

39. None of the experts who testified had ever sent out a Notice to Shareholders without including an effective S-4.

40. Although sending out the Notice with the effective S-4 isn't technically required, it is the usual and customary course of conduct. Feis Testimony.

41. Sending the effective S-4 without sufficient time for review might have impaired the dissenters' ability to exercise their rights. This could have opened up the

possibility of post-merger litigation. Mendelsohn Testimony.

42. The Court finds no evidence that any of the parties contemplated this unusual procedure in December of 1990. In fact, Mr. Goon stated in a letter sent to GI dated November 6 1990, that "[w]e simply cannot mail a notice of stockholders' meeting to the GI stockholders until the S-4 has been filed with the SEC, reviewed by the SEC, amended as a result of comments of the SEC, and declared effective by the SEC." Ex. 262 at p. 1. The Court finds no evidence that Mr. Goon had reconsidered his position by December 19, 1990.

43. THEREFORE, THE COURT FINDS THAT GI WOULD NOT HAVE ISSUED THE SHAREHOLDER NOTICE UNTIL THE SEC DECLARED THE S-4 EFFECTIVE.

44. In order to allow twenty days' notice prior to the shareholder vote, the S-4 would have had to have been declared effective no later than January 11, 1991 to meet the walk-away date of January 31, 1991.

45. The Court notes that even if the parties did send the Notice without an effective S-4, its finding that it would have taken 39 days for the SEC to declare the S-4 effective means that the S-4 would not have been effective until the walk-away date of January 31, 1991. Hence, the shareholders would have received the effective S-4 on the day of the vote. None of the experts suggested that this situation would have provided sufficient notice.

IV. S-4 ACCOUNTING ISSUES

A. The SEC Would Not Have Accepted GI's Financials Until GI's Accountants Resolved the Scope Limitation

46. GI had to provide Republic's accountants with certified financial statements for the three years prior to the merger. Dewald Declaration.

47. These statements contained two qualifications regarding destroyed records (the scope limitation) and the going concern assumption. Rudd Declaration.

48. Republic's accounting expert, Mr. Rudd, testified that Republic's attorneys and accountants could have convinced the SEC to accept the going concern assumption without much difficulty.

49. The scope limitation violated Staff Accounting Bulletin #1. Exhibit 1151. That Bulletin states that a cope limitation is equivalent to unaudited financials, which are unacceptable to the SEC. Rudd and Dewald Testimony.

50. Mr. Rudd testified that the SEC was not likely to waive the scope limitation and that most likely Deloitte & Touche would have to perform certain time-consuming procedures to convince themselves and/or the SEC that GI's internal controls were sufficiently strict to ensure that the problem did not affect GI's financials.

51. Mr. Rudd based his conclusion on his recent experience with the SEC. He explained that when Republic submitted the S-1 it contained financial information about Alliance Corporation. These financials contained a scope limitation comparable in magnitude to the limitation in GI's financials and the SEC would not agree to waive the application of the Bulletin.

52. Although Mr. Dewald states in his Declaration that the SEC would have waived the application of the Bulletin, he did not base his opinion on recent SEC experience. In addition, the Court rejects Dewald's view that the scope limitation was unimportant because it related to records of a previously divested subsidiary. Dewald Declaration. The Court credits Mr. Rudd's testimony that the missing records of the subsidiary had an impact on the accountant's ability to verify information on current GI financials. Mr. Dewald testified that he was unaware of the interrelationship between GI and the divested subsidiary such as GI's on-going guarantees of the subsidiary's debts.

53. Because the Court accepts Mr. Rudd's testimony regarding the seriousness of the scope limitation, the Court also accepts his opinion that it would have taken Deloitte & Touche 2-3 weeks to resolve the problem and that the SEC would have required that action before it would accept the financials.

B. GI Was Responsible for Resolving the Problems with Its Financials

54. The Merger Agreement states it was Republic's responsibility to get the S-4 filed as soon as practicable. Ex. 26, Section 9.1.

55. However, both parties had retained sophisticated attorneys and accountants to work on the merger.

56. The parties had agreed to cooperate in completing the S-4. Republic's counsel sent GI's counsel a memo detailing the division of labor in October of 1990. Ex. 161.

57. In that memo, Repubic's counsel states that Republic's accountants would not be able to take care of all of the GI financial information required for the S-4.

The memo states that "[a]lthough the provision of G.I. financial information is, at bottom, the responsibility of G.I., the Republic side will, of course, provide as much help as possible." Ex. 161 at p. 2. GI did not present any evidence that it ever refuted this division of labor.

58. Mr. Goon wrote to GI in early November explaining that although Republic was primarily responsible for filing the S-4, GI was assisting with preparation of the parts of the S-4 relating to GI. Ex. 262 at p. 2.

59. GI's outside accountants, Deloitte & Touche, included the scope limitation in their audit of GI's financials.

60. Deloitte & Touche would have to be involved in any resolution of the qualification problem. Rudd Testimony.

61. The Court finds no evidence that Deloitte & Touche had started working on the scope limitation problem as of December 19, 1990.

62. ACCORDINGLY, THE COURT FINDS THAT GI AGREED TO BE RESPONSIBLE FOR THE GI FINANCIALS REQUIRED FOR THE S-4 AND THAT ALTHOUGH GI'S ACCOUNTANTS WERE AWARE OF THE POTENTIALLY TROUBLESOME SCOPE LIMITATION, THE PROBLEM REMAINED OUTSTANDING AS OF DECEMBER 19, 1990.

C. GI Was Responsible for Providing Interim Financials.

63. The SEC would have required October 31, 1990 financial information if the S-4 had not become effective by December 14, 1990. Dewald Declaration.

64. GI had not yet divested GIEL as of December 19, 1993.

65. GIVEN THE COURT'S FINDING THAT THE GIEL DIVESTITURE INFORMATION WOULD BE INCLUDED IN THE S-4, OCTOBER 31, 1990 FINANCIAL INFORMATION WOULD HAVE BEEN REQUIRED.

66. GI's accountant Jeff Hass stated that he provided this information by the time he left in mid-December. Hass Declaration.

67. Although GI's expert suggests that Republic could have filed the S-4 without updated financials, the Court finds no evidence that the parties considered doing so in December of 1990.

68. HENCE, THE COURT FINDS THAT REPUBLIC WAS WAITING ON GI'S FINANCIAL INFORMATION AND COULD NOT HAVE FILED THE S-4 PRIOR TO MID-DECEMBER.

V. SEC REVIEW TIME FOR AN AVERAGE S-4 FILING

69. One of Republic's accountants, Linda Wegener, stated in a memo dated November 29, 1989 that the SEC would declare the S-4 effective within one week of filing. Exhibit 168. She provided no basis for this opinion.

70. Mr. Goon testified that Wegener's suggestion of a turn around time of seven days would be "herculean".

71. Mr. Cohen, Republic's corporate counsel, testified in his deposition that the SEC would have declared the S-4 effective in time to meet the January 31, 1991 walk-away date. However, throughout his testimony he expresses reservations regarding financial statements, legal questions, problems created by the Christmas season, and problems created by exhausted internal and external financial people. Although he explains that he

expected to solve these problems, he is candid about the fact that as of early December he did not know how he would do so. Cohen Deposition at 36-40. In addition, Cohen fails to mention the complications and additional scrutiny created by divesting GIEL to insiders. The Court finds his statements to be conclusory as it is impossible to determine whether he took into account all of the relevant factors in stating his opinion on the timing issue. For these reasons, the Court does not find Mr. Cohen's testimony to be as persuasive as Mr. Mendelsohn's testimony.

72. GI's expert, Mr. Feis, testified that he has been lead partner on six S-4 filings involving a stock for stock swap.

73. Republic's expert, Mr. Mendelsohn, testified that he worked at the SEC for six years and that he now heads the Corporate Security Department at his firm.

74. The Court recognizes that Mr. Mendelsohn's firm is Republic's outside counsel. Nevertheless, the Court finds that Mr. Mendelsohn's testimony was credible and persuasive.

75. Mr. Feis states in his Declaration that because the SEC had previously reviewed the S-1, the S-1 could have been declared effective without any SEC review.

76. None of the experts who testified in this case have ever filed an S-4 which the SEC did not issue comments on and review.

77. Mr. Feis states in his Declaration that if the SEC did review the S-4, it would have been declared effective within three weeks of filing.

78. Mr. Feis did not give sufficient basis for his conclusion that an SEC review would take three weeks. He stated that the SEC tries to work with counsel who face deadlines. However, the Court accepts Mr. Mendelsohn's view that the SEC staff hears pleas of

emergency every day. The Court also accepts Republic's counsel's argument that because the Merger Agreement did not contain a closing date, and that GI's emergency resulted because Republic would walk away on January 31st, the SEC would be unlikely to be sympathetic.

79. In contrast, Mr. Mendelsohn explained that the SEC customarily issues its initial comment letter 30 days after filing because of an historical agency practice in which the staff member's superior sends a memo if the staff member does not issue a comment letter in thirty days.

80. The Court notes as well that the SEC issued its comment letter on Republic's S-1 30 days after filing. *See* Ex. 262.

81. Mr. Mendelsohn testified that it takes a week to respond to the SEC's comment letter. As long as the SEC accepts the response, Mr. Mendelsohn explained that the party may apply for expedited treatment at this time. If the SEC agrees, it will declare the S-4 effective within 48 hours. Mr. Mendelsohn then allowed two days for printing and mailing.

82. Mr. Feis testified that attorneys can respond to a comment letter overnight, that the SEC approves the S-4 within one day, and that printing and mailing is accomplished overnight.

83. The Court does not accept Mr. Feis's view of response time. Mr. Feis suggested that this response would include discussions with the SEC. These discussions would require at least one day as the SEC doesn't work over night.

84. The Court finds that Mr. Mendelsohn's testimony about the forty-eight hour period after receiving expedited treatment is uncontroverted. Mr. Feis did not refute this statement of SEC policy.

85. The Court is unable to make a finding as to whether printing and mailing takes twelve hours or two days. Hence, it will give GI the benefit of the doubt and accept the overnight view.

87. Accordingly, the Court finds that the reasonable estimate of time from filing to effective date would be 39 days: thirty days for initial comment letter; seven days for response and SEC review; two days for expedited treatment; overnight mailing.

88. The Court accepts Mr. Mendelsohn's testimony that these dates reflect a smooth filing. This amount of time for SEC review isn't an average time; it is a time period that a securities lawyer would view as being very efficient with a smooth filing.

89. Even assuming that the S-4 filing went smoothly, the Court finds that the SEC would not have declared it effective until January 31, 1991. This date is 41 days after the filing date of December 21, 1990. The Court takes judicial notice of the Christmas and New Year's holidays and adds two days to the time period.

VI. THIS FILING WOULD NOT BE A SMOOTH FILING

90. The Court notes that the earliest possible filing date was December 21, 1990. The Court takes judicial notice of the fact that the holiday season is a time of below average efficiency in all businesses because of disruptions due to days off and scheduled vacations.

91. Both SEC experts stated that an affiliated transaction such as selling GIEL to the Asadurians would have created increased SEC scrutiny. Feis and Mendelsohn Testimony.

92. Aside from the GIEL divestiture, the Merger Agreement gave the insiders benefits including assump-

tion of indebtedness, elimination of certain guarantees, and employment contracts. Ex.

93. Such benefits trigger increased scrutiny as they involve insiders.

94. The scope limitation on the GI financials violated Staff Accounting Bulletin #1 and would have required work by Deloitte & Touche as well as discussions with the SEC. Rudd and Dewald Testimony.

95. The Court finds no evidence that Deloitte & Touche had begun any of this work. The Court accepts Mr. Rudd's testimony that the scope limitation problem would have required 2-3 weeks to resolve.

96. ACCORDINGLY, THE COURT FINDS THAT ASSUMING A SMOOTH SEC REVIEW IS OVERLY OPTIMISTIC AND IS NOT REASONABLE.

97. AS THE COURT FINDS THAT A SMOOTH REVIEW WOULD NOT HAVE BEEN ACCOMPLISHED IN TIME TO MEET THE JANUARY 31 WALK-AWAY DATE, AND THAT THIS FILING RAISED SEVERAL TROUBLESOME ISSUES, THE COURT FINDS THAT GI WOULD NOT HAVE BEEN ABLE TO ACCOMPLISH ALL OF ITS RESPONSIBILITIES IN TIME TO MEET THE WALK-AWAY DATE.

CONCLUSIONS OF LAW

1. In order to recover damages, GI must prove that it would have been ready, willing and able to perform absent Republic's breach. *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613, 625, 2 Cal. Rptr .2d 288 (1991)

2. The Court interprets *Ersa Grae* to mean that GI must prove that its ability to perform was reasonable

under the circumstances rather than that it was possible or conceivable that GI could have performed.

IT IS SO ORDERED.

DATED: August 11, 1993

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 12 1993
Clerk, U.S.District Court
Central District of California
By /s/ Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

REPUBLIC WASTE INDUSTRIES, INC.,
Plaintiff,
v.
G.I. INDUSTRIES, MANUAL ASADURIAN, SR., and MIKE SMITH,
Defendants.

G.I. INDUSTRIES,
Counterclaimant,
v.
REPUBLIC WASTE INDUSTRIES, INC.,
Counterdefendant.

CV 91 2422 SVW (Kx)

JUDGMENT

In accordance with the Court's Memorandum of Opinion, filed August 17, 1992; Order Denying Republic Waste Industries' Motion for Partial Summary Judgment and Granting G.I. Industries' Motion for Partial Summary Judgment, filed April 26, 1993; Findings of Fact,

filed July 15, 1993; and Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the counterclaimant G.I. Industries shall take nothing by way of its suit against the counter-defendant, Republic Waste Industries, Inc.. IT IS FURTHER ORDERED THAT plaintiff Republic Waste Industries, Inc. shall take nothing by way of its suit against defendant, G.I. Industries.

Pursuant to the Memorandum of Decision, the Security Agreement is reformed to reflect that Conejo rather than G.I. Industries actually owns the routes pledged as collateral. Pursuant to the Order filed April 26, 1993, the collateral pledged in that Security Agreement includes both front roller and roll-off routes.

IT IS SO ORDERED.

DATED: August 11, 1993

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
United States District Judge